Nos. 93-1002, 93-1018, 93-1019, 93-1020, 93-1061 and 93-1073

In the Supreme Court of the United States

OCTOBER TERM, 1993

CREACIONES VIVIANA LTDA., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ABUCHAIBE HNOS. LTDA., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

COMERCIAL SAMORA LTDA., PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ORGANIZACION JD LTDA., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

INDUSTRIAS MARATHON LTDA., PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

MANUFACTURERA DEL ATLANTICO LTDA., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether evidence of electronic fund transfers through banks in New York City should have been suppressed on the ground that they were unlawfully intercepted within the meaning of 18 U.S.C. 2510(4), and whether petitioners were entitled to damages for disclosure of those transfers.

2. Whether petitioners' counterclaims for damages under the Right to Financial Privacy Act, 12 U.S.C. 3401 *et seq.*, were properly denied because petitioners never held accounts in their names at the intermediary New York banks.

3. Whether the *in rem* forfeiture complaints in this case were sufficiently particularized (Nos. 93-1002, 93-1018, 93-1019, 93-1061, and 93-1073).

4. Whether the district court abused its discretion in holding a joint trial, and whether there was sufficient evidence to justify the forfeiture verdict (Nos. 93-1002, 93-1018, 93-1019, 93-1061, and 93-1073).

5. Whether the forfeitures of petitioners' funds constituted excessive fines under the Eighth Amendment (Nos. 93-1002, 93-1018, 93-1061, and 93-1073).

6. Whether the court of appeals correctly determined that petitioners could challenge an IRS levy only by bringing a separate wrongful levy action under 26 U.S.C. 7426 (No. 93-1020).

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ORGANIZACION JD LTDA., ET AL., PETITIONERS

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1b-100b)[1] is reported at 6 F.3d 37. The opinion of the district court (Pet. App. 1a-76a) is reported at 801 F.Supp. 984. A related opinion of the district court in a civil suit by peti-

[1] All citations to the appendix to the petition are to the appendix in No. 93-1002, unless otherwise indicated.

tioners against certain banks (93-1018 Pet. App. 1d-77d) is reported at 792 F.Supp. 180.

JURISDICTION

The judgment of the court of appeals was entered on September 10, 1993. A petition for rehearing was denied on October 6, 1993. Pet. App. 1c-4c. The petition for a writ of certiorari in No. 93-1002 was filed on December 20, 1993; in No. 93-1018 on December 27, 1993; in No. 93-1019 on December 23, 1993; in No. 93-1020 on November 15, 1993; in No. 93-1061 on December 28, 1993; and in No. 93-1073 on January 3, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

In July 1990, the government filed a civil forfeiture action under 18 U.S.C. 981 and 21 U.S.C. 881 seeking forfeiture of approximately $12 million that was alleged to be narcotics proceeds being laundered through various bank accounts. Petitioners filed claims to the funds, asserting that they were the proceeds of legal commercial activities. After a jury trial in the United States District Court for the Eastern District of New York, the jury returned a verdict forfeiting approximately $10 million to the government.[2] The district court also dismissed petitioners' action against the Assistant United States Attorneys and Drug Enforcement Administration (DEA) agents involved in this case, as well as the coun-

[2] Petitioner Comercial Samora Ltda. withdrew its claim to the funds prior to trial. Consequently, the district court entered a separate judgment against Commercial Samora Ltda. Pet. App. 19b-20b. The jury found that funds claimed by petitioners Organizacion JD Ltda. and Manufacturas JD Ltda. were not traceable to illegal transactions. However, after judgment, the IRS served a levy against those funds on the clerk of the district court. *Id.* at 18b, 97b-98b.

terclaims of all petitioners for violations of the Electronic Communications Privacy Act of 1986, 18 U.S.C. 2510-2521, and the Right to Financial Privacy Act of 1978, 12 U.S.C. 3401 *et seq.* The court of appeals affirmed. Pet. App. 1b-100b.

1. The forfeitures arose out of an effort to impede the money laundering activities of the Cali, Colombia, drug cartel, headed by Jose Santacruz-Londono. The Cali cartel is responsible for importing some 3,000 kilograms of cocaine per month into this country. The cartel uses bank accounts throughout the United States, Europe, and Central and South America to store and move its drug proceeds. It moves its funds through the banks by various means, including electronic funds transfers (EFTs) for eventual deposit into Colombian bank accounts. Pet. App. 8b-9b.

An EFT is begun when a customer's bank sends a message to the transfer system's central computer that states the amount of money to be transferred, the identity of the sending and receiving banks, and the identity of the intended beneficiary. The central computer adjusts the account balances of the sending and receiving banks and generates a debit ticket at the sending bank and a credit ticket at the receiving bank. The receiving bank also notifies the beneficiary of the transfer. If the sending bank and receiving bank are not directly connected to the same network, the transfer must go through one or more intermediary banks. Each of them receives a credit for its own account when it receives the EFT and then a debit when it sends the EFT to the next bank in line. International transactions often require a series of such transfers through one or more intermediary banks. A series of such transfers can occur extremely quickly. Pet. App. 9b-10b.

The seizures at issue in this case stemmed from the arrests in Luxembourg on June 28 and 29, 1990, of three associates of Santacruz-Londono. The three men had opened hundreds of bank accounts in Europe and had deposited large sums of money in the accounts for the Cali cartel. Fearing that the arrests would cause the cartel to move its funds to Colombia before they could be confiscated, Luxembourg law enforcement authorities requested several countries, including the United States, to freeze the cartel's funds. During July and August 1990, there was a flurry of EFTs from the accounts. Authorities seized $30 million in Europe, $16 million in Panama, and $12 million in this country. Pet. App. 11b; *id.* at 10a-12a.

The funds seized in the United States came from certain bank accounts, as well as dozens of EFTs sent through intermediary New York City banks—Banco Atlantico, Manufacturers Hanover, and The Bank of New York—that had correspondent banking relationships with Panamanian and Colombian banks. After receiving the EFTs, the intermediary New York banks were to credit the accounts of designated correspondent Colombian banks, and the Colombian banks were then to credit the accounts of their customers, the ultimate beneficiaries. Through oral orders and a series of eight *in rem* arrest warrants, federal agents instructed the intermediary New York banks to attach all funds on deposit in the names of various individuals and entities associated with Santacruz-Londono, as well as to inform the agents about all transfers that appeared to be destined for a related third-party beneficiary in Colombia. The New York banks complied with the agents' directions. As a result of the information supplied by the banks, the successive *in rem* complaints each included additional names. Pet. App. 12b-13b.

2. Petitioners and seven other claimants, all purportedly Colombian clothing export companies, were the intended beneficiaries of the seized EFTs. They filed claims to some $6.5 million of the seized funds, denied the allegations of the forfeiture complaint, and asserted that the monies had been derived from legitimate clothing sales. Petitioners also brought two counterclaims that sought damages for violations of the Fourth and Fifth Amendments, the Electronic Communications Privacy Act of 1986, 18 U.S.C. 2510-2521 and 2701-2710, the Right to Financial Privacy Act of 1978, 12 U.S.C. 3401-3422, the Federal Tort Claims Act, 28 U.S.C. 2671-2680, and the forfeiture statutes. The district court dismissed the counterclaims prior to trial. Pet. App. 14b-15b.

Petitioners also sued the intermediary banks for loss of the use of their funds and violations of various statutes. The district court granted summary judgment in favor of the banks, holding that they could not be held liable for following government orders concerning claimed government funds. Pet. App. 15b-16b; 93-1018 Pet. App. 33d-77d. Petitioners also sued the Assistant United States Attorneys and DEA agents involved in this case, who had directed the banks to seize the funds. The district court dismissed that action for failure to state a claim. Pet. App. 16b.

The district court found that there was probable cause to seize the funds. The court also denied petitioners' motions to suppress evidence. Pet. App. 16b-17b. Corporate and banking records introduced at trial, as well as testimony of witnesses familiar with the Cali cartel, linked the seized funds to Santacruz-Londono's drug proceeds and to various Panamanian and Colombian shell corporations. The jury found that 18 of the 22 seized funds were forfeitable, but that the funds claimed by petitioners Manufacturas JD Ltda. and Organizacion JD Ltda. were

not traceable proceeds of money laundering and narcotics transactions, and that Confecciones Elizabeth Ltda. was an innocent owner. *Id.* at 17b-18b.

3. On appeal, the court of appeals affirmed the district court's rulings in all respects. The court of appeals observed that the government can proceed in three ways to seize property subject to forfeiture under 21 U.S.C. 881. First, the government can follow the process in the Supplemental Rules for Certain Admiralty and Maritime Claims (Supp. R.). Second, the government can obtain a seizure warrant under Fed. R. Crim. P. 41(c). Finally, the government can seize the property under 21 U.S.C. 881(b)(4) without judicial process when the Attorney General has probable cause to believe the property is subject to forfeiture. Pet. App. 24b-25b.

The court held that the seizures of at least nine of the EFTs "followed the process prescribed by the Supplemental Rules." Pet. App. 27b. The court held that the *in rem* complaints were sufficiently particularized, under Supp. R. C(2) and E(2). Pet. App. 31b-36b. According to the court, because the complaints named the intermediary banks through which the funds were to be transferred, as well as the intended beneficiaries of the transfers, the complaints described the subject property with requisite particularity. *Id.* at 34b-35b. The court likewise found that the seizures of 11 fund amounts without warrants were proper under 21 U.S.C. 881(b)(4), because the government had probable cause to believe that the EFTs were subject to civil forfeiture. Pet. App. 36b-38b.

With respect to petitioners' Fourth Amendment claims, the court of appeals held that exigent circumstances justified the warrantless seizures (Pet. App. 39b-42b), and that there was probable cause to bring the forfeiture complaints. *Id.* at 42b-46b. The court of appeals likewise held that petitioners had no privacy interest in

the intermediary banks' financial records. *Id.* at 47b-50b. The court first reasoned that petitioners' relationship with the intermediary banks was too remote to allow petitioners to claim any expectation of privacy in information about the EFTs. *Id.* at 47b. Even if petitioners had had their own accounts with the intermediary banks, the court held, information concerning those accounts would not be protected by the Fourth Amendment, because the DEA was authorized to make inquiries of the banks, and the banks were authorized to turn over the information. Pet. App. 47b-50b, citing *SEC* v. *Jerry T. O'Brien, Inc.*, 467 U.S. 735, 743 (1984), and *United States* v. *Miller*, 425 U.S. 435, 440, 445-446 (1976).

The court also rejected petitioners' claims under the Right to Financial Privacy Act (RFPA), 12 U.S.C. 3401 *et seq.* Although the DEA did not give notice to petitioners of the subpoenas to the intermediary banks, the court held that no notice was required under the statute, because petitioners did not hold accounts in their names at the banks, as required by 12 U.S.C. 3401(5). The court pointed out that the seized funds did not come from accounts held in any claimant's name, but rather were wire transfers to be credited to the accounts of Colombian banks that were maintained at the intermediary banks. Petitioners never maintained accounts in their names at the intermediary banks. Pet. App. 55b-56b. The court also agreed that, because the only authorized remedy for violations of the RFPA are civil penalties, petitioners would not be entitled to suppression of evidence even if the RFPA were violated. Pet. App. 56b-57b.

The court also rejected petitioners' claims that the *in rem* warrants did not satisfy the Electronic Communications Privacy Act of 1956 (ECPA), Pub. L. No. 99-508, § 105(b), 100 Stat. 1856, which added "electronic communications" to the coverage of the wiretap statute, 18

U.S.C. 2510-2521.[3] The court concluded that the ECPA prohibits interceptions of electronic communications through the use of a device. Since the government did not use any kind of "device" to obtain the EFTs here, no interception occurred within the meaning of the statute. Pet. App. 67b-68b.

In addition, the court held that the government had established that there was probable cause to believe that the funds represented proceeds traceable to drug transactions. The court ruled that "the extensive evidence regarding the Santacruz-Londono organization as a whole was more than sufficient to link the defendant funds to illegal drug trafficking," and "[e]ach one of the claimants was linked to Santacruz-Londono through the testimony of at least one witness." Pet. App. 84b-85b. In so ruling, the court adhered to its own established precedent that the government was not required to "link the monies to any one particular transaction." *Id.* at 80b-81b. The court of appeals also affirmed the district court's denial of petitioners' motion for judgment notwithstanding the verdict. The court of appeals concluded that there was "overwhelming evidence" linking petitioners to drug trafficking and money laundering. *Id.* at 96b.

Finally, the court of appeals held that Manufacturas J.D. Ltda. and Organizacion J.D. Ltda. could not challenge in this case the post-trial IRS levy on their funds. The IRS had levied against their funds on the ground that they were nominees or alter egos of Johnny Daccarett, a delinquent taxpayer who owed the government $3 million. The court held that petitioners had to file a

[3] The court noted that "[t]he statute is directed at regulating surveillance activities," Pet. App. 63b, but assumed arguendo it also applied to EFTs. *Id.* at 63b-64b.

separate wrongful levy action under 26 U.S.C. 7426 if they wanted to challenge the levy. Pet. App. 97b-99b.[4]

ARGUMENT

1. Petitioners contend (93-1002 Pet. 22-35; 93-1018 Pet. 21-33; 93-1019 Pet. 19-31; 93-1020 Pet. 34-50; 93-1061 Pet. 21-33; 93-1073 Pet. 22-34) that the court of appeals erred in concluding that the EFT seizures did not violate the Electronic Communications Privacy Act amendments to the wiretap statute. They argue that the court erred in holding that no interception occurred. They also claim that the intermediary banks violated 18 U.S.C. 2703(a) by disclosing the EFT information to the government, and that as a result all evidence of the EFT transfers should have been suppressed and they should have been awarded damages for the violations.[5]

a. The wiretap statute, as modified by ECPA, prohibits certain interceptions of electronic communications. See 18 U.S.C. 2511(1). Under 18 U.S.C. 2510(12), an "electronic communication" is defined as "any transfer of signs, signals, writing, images, sounds, data, or intelligence of any nature transmitted * * * by a wire." The statute defines "intercept" as "the aural or other acquisition of the contents of any wire, electronic, or

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[4] The court of appeals rejected petitioners' other arguments, including that the EFTs did not qualify as a seizable *res*, and that petitioners satisfied their burden of proving that they were innocent owners of the funds. Petitioners do not renew those claims here.

[5] Petitioner Comercial Samora Ltda. withdrew its claims prior to trial, and therefore waived any complaints about the outcome of the trial. That includes its claims that the EFT seizures violated the ECPA, that the district court erred in denying their counterclaims for damages under the Right to Financial Privacy Act, and that the July 13, 1990, *in rem* warrant was a general warrant. Pet. App. 19b-20b.

oral communication *through the use of any electronic, mechanical, or other device.*" 18 U.S.C. 2510(4) (emphasis added). If no device is used to acquire the contents of a wire communication, the statute is not implicated. See *United States* v. *New York Tel. Co.*, 434 U.S. 159, 167 (1977). The court below therefore was correct in focusing on the question whether the government acquired the contents of any EFT through the use of an electronic, mechanical, or other device. See Pet. App. 67b-68b.[6]

Other courts of appeals have held that once a transmission is completed, the government's subsequent acquisition of the information contained in the transmission does not violate the statute, because no interception has occurred. See, *e.g.*, *United States* v. *Meriwether*, 917 F.2d 955, 959-960 (6th Cir. 1990) (acquisition of a telephone number from a telephone pager display after transmission was completed was proper because no interception took place); *United States* v. *Turk*, 526 F.2d 654, 658 (5th Cir.), cert. denied, 429 U.S. 823 (1976) (interception requires a contemporaneous acquisition of the communication through the use of a device). That interpretation is consistent with the legislative history of the ECPA, which explained that the pre-ECPA definition of "intercept" under Section 2510(4) "is retained" and is expanded only in that "it is illegal to intercept the

[6] We doubt that petitioners were "aggrieved person[s]" who may move to suppress the contents of any wire communication intercepted under the wiretap statute. 18 U.S.C. 2518(10)(a). An "aggrieved person" is defined by Section 2510(11) as "a person who was a party to any intercepted wire, oral, or electronic communication or a person against whom the interception was directed." Petitioners were not parties to any of the EFTs in question; indeed, they denied at trial that they had ever received any documents from any United States bank. See Gov't C.A. Br. 65.

non-voice portion of a wire communication." S. Rep. No. 541, 99th Cong., 2d Sess. 13 (1986). The Senate Report further explained that "the crime of interception under the [ECPA] consists of the intentional acquisition of the contents of a wire, electronic or oral, communication through the use of any electronic, mechanical or other device." *Id.* at 24.

Here the government did not intercept the EFT transmissions while they occurred, but instead simply directed the intermediary banks not to credit the EFTs to the Colombian correspondent banks. In that process, the government did not use a device to acquire the contents of an electronic communication. Although the banks may have entered certain instructions into their computers in order to halt the incoming EFTs before they could be rerouted to the Colombian correspondent banks, that does not constitute an interception within the meaning of the statute, *i.e.*, the use of a device to acquire information conveyed in the communication. The court of appeals therefore correctly held that no interception occurred within the meaning of 18 U.S.C. 2510(4). Pet. App. 68b. Petitioners do not cite any decision of any other court to the contrary.[7]

[7] Petitioners also contend (93-1002 Pet. 48-50; 93-1018 Pet. 46-52; 93-1019 Pet. 33-35; 93-1020 Pet. 34-50; 93-1061 Pet. 47-53; 93-1073 Pet. 48-54) that they are entitled to damages because of the disclosure of the contents of the electronic communications. Since the government did not violate the ECPA in obtaining information about the EFTs, petitioners are not entitled to damages for violations of that statute. And in any event, petitioners would not be entitled to damages from the government, because 18 U.S.C. 2520(a), which creates a right to sue for damages, does not set out a cause of action against the United States. It therefore does not constitute a waiver of the government's sovereign immunity. See *United States* v. *Mitchell*, 445 U.S. 535, 538 (1980) (waivers of

b. Petitioners also argue (93-1002 Pet. 30; 93-1018 Pet. 28; 93-1019 Pet. 27; 93-1020 Pet. 41; 93-1061 Pet. 28; 93-1073 Pet. 29) that the banks violated 18 U.S.C. 2703 in turning over information about the EFTs to the government. Under 18 U.S.C. 2707 and 2708, the only remedy for a violation of Section 2703 is a civil action by a provider of electronic communications services.[8] Accordingly, suppression is not an available remedy for a violation of Section 2703. And petitioners—who were not themselves providers of electronic services—have no right to bring a civil action for damages under Section 2707.

2. Petitioners argue (93-1002 Pet. 51-53; 93-1018 Pet. 52-54; 93-1019 Pet. 31-33; 93-1020 Pet. 51-53; 93-1061 Pet. 53-55; 93-1073 Pet. 54-56) that the district court erred in denying their counterclaims for civil penalties under the Right to Financial Privacy Act of 1978, 12 U.S.C. 3417. That statute provides that "[a]ny agency or department of the United States or financial institution obtaining or disclosing financial records or information contained therein in violation of this chapter is liable *to the customer* to whom such records relate" for specified civil penalties. 12 U.S.C. 3417(a) (emphasis added). The

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sovereign immunity "cannot be implied but must be unequivocally expressed").

[8] Section 2708 provides:

> The remedies and sanctions described in this chapter are the only judicial remedies and sanctions for nonconstitutional violations of this chapter.

"This chapter" is Chapter 121, governing Stored Wire and Electronic Communications and Transactional Records Access. Section 2518, on the other hand, which does provide for a suppression remedy, is in Chapter 119. The only remedies under Chapter 121 are those in Section 2707, which provides for damages and for equitable relief as may be appropriate. See 18 U.S.C. 2707(b)(1).

courts below correctly determined, however, that petitioners were not "customers" of the intermediary banks within the meaning of 12 U.S.C. 3401, and therefore had no right to civil penalties.

The statute defines a customer as "any person or authorized representative of that person who utilized or is utilizing any service of a financial institution, or for whom a financial institution is acting or has acted as a fiduciary, *in relation to an account maintained in the person's name.*" 12 U.S.C. 3401(5) (emphasis added). A "person" is defined as "an individual or a partnership of five or fewer individuals." 12 U.S.C. 3401(4). Relying on the plain language of the statute, the court of appeals noted that "[t]he RFPA is meant to protect those who maintain accounts in their names at financial institutions." Pet. App. 56b. Indeed, the definition of a customer under the RFPA turns on "whether the individual maintains the financial account in his or her name only." *Duncan* v. *Belcher*, 813 F.2d 1335, 1338 (4th Cir. 1987).

As the court of appeals recognized, even assuming petitioners were limited partnerships of five or fewer individuals and thus would otherwise qualify as "persons" under the statute, they did not hold any accounts in their names at the intermediary New York banks. Pet. App. 54b-56b. Those banks, which had no dealings with petitioners, simply held the funds pursuant to arrest warrants. Consequently, the courts below were correct in denying petitioners' counterclaims under the RFPA.

3. Petitioners Creaciones Viviana Ltda., et al., Abuchaibe Hnos. Ltda., Comercial Samora Ltda., Industrias Marathon Ltda., and Manufacturera Del Atlantico, Ltda., et al. argue (93-1002 Pet. 35-38; 93-1018 Pet. 33-37; 93-1019 Pet. 36-39; 93-1061 Pet. 34-37; 93-1073 Pet. 35-38) that the July 13, 1990, *in rem* warrant was a general warrant.

The forfeiture complaints alleged that Santacruz-Londono had caused substantial amounts of money that were proceeds of drug trafficking and money laundering to be transferred through the defendant accounts for ultimate credit to accounts of the various claimants. In addition, an international letter rogatory was incorporated by reference in the complaint. That letter rogatory described in greater detail the investigation of Santacruz-Londono, the arrests of three cartel members in Luxembourg, and the use of Panamanian and Colombian shell corporations to disguise the illegal nature of the proceeds. Pet. App. 33b-34b. Moreover, petitioners filed claims and responses to the seventh amended complaint without moving for a more definite statement. Pet. App. 35b. In those circumstances, the court of appeals correctly held that, because the *in rem* complaint described the intermediary banks through which the funds were transferred as well as the intended beneficiaries, the complaint described the subject property with sufficient particularity to enable petitioners to investigate the facts and frame a responsive pleading under Supplemental Rule E(2)(a). Pet. App. 34b-35b.[9]

4. Petitioners Creaciones Viviana Ltda., et al., Abuchaibe Hnos. Ltda., Industrias Marathon Ltda., and Manufacturera Del Atlantico Ltda. also argue (93-1002 Pet. 39-43; 93-1018 Pet. 37-41; 93-1061 Pet. 38-42; 93-1073 Pet. 39-43) that the district court abused its discretion in

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[9] In addition, the court of appeals held that the government had probable cause for the warrantless seizures of 11 of the funds. Pet. App. 36b-38b. Section 881(b)(4) gives the Attorney General authority to seize property prior to filing a forfeiture complaint if the government has probable cause to believe that the property is forfeitable. Petitioners do not challenge the court of appeals' ruling in this regard. We note that forfeiture complaints were filed within days of the warrantless seizures. See Pet. App. 38b.

considering their claims along with those of the other claimants and in not tracing each EFT to a particular illegal drug transaction.

The district court did not abuse its discretion in holding a joint trial. Although petitioners claim that they were prejudiced by evidence introduced against other claimants, the jury was able to compartmentalize the evidence concerning each claimant. The jury found that sums attributed to two claimants were not drug proceeds and that a third claimant was an innocent owner. Consequently, petitioners were not prejudiced by the joint trial.

Moreover, further review of the factbound decision by both courts below to uphold the jury's forfeiture verdicts is not warranted. Both courts were satisfied that the evidence overwhelmingly showed that the sums claimed by petitioners were traceable to Santacruz-Londono's drug and money laundering enterprise. Pet. App. 84b-85b, 96b, 29a-35a. As the court of appeals noted, the evidence included not only documents from Colombia and other countries, but also the "testimony of former members of the Cali Cartel, numerous DEA agents, a Luxembourg police officer, a member of the Internal Revenue Service's criminal investigations division, a United States customs official, and a certified public accountant who reviewed the claimants' business records." Pet. App. 84b.[10] Nothing more was required.

[10] For example, the accountant had previously worked with garment manufacturers and testified as an expert witness. He and his staff reviewed more than 30,000 documents that the claimants had produced and concluded that the records indicated that the alleged purchases of goods were false; that the rapid growth of each claimant's sales and income were unbelievable in light of the capital and financing reported in their own records; that the export subsidy provided by the Colombian government was insufficient to

5. Petitioners Creaciones Viviana Ltda., et al., Abuchaibe Hnos. Ltda., Industrias Marathon Ltda., and Manufacturera Del Atlantico Ltda., et al., also argue (93-1002 Pet. 43-47; 93-1018 Pet. 41-46; 93-1061 Pet. 42-47; 93-1073 Pet. 43-48) that the forfeiture of the funds in question violated the Eighth Amendment and was contrary to *Austin* v. *United States*, 113 S. Ct. 2801 (1993). Petitioners have waived that claim because they did not raise it until their petitions for rehearing in the court of appeals, and that court did not pass on it. See *Heckler* v. *Campbell*, 461 U.S. 458, 468 n.12 (1983); *Delta Air Lines, Inc.* v. *August*, 450 U.S. 346, 362 (1981); *United States* v. *Lovasco*, 431 U.S. 783, 788 n.7 (1977); *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970).

In any event, petitioners' Eighth Amendment claim has no merit. In *Austin*, this Court held that forfeitures of property under 21 U.S.C. 881(a)(4) and (a)(7) that are "used or intended for use to facilitate" drug transactions may violate the Eighth Amendment, because they must be characterized as penal in nature. See 113 S. Ct. at 2811. The jury verdicts in this case, however, were *not* based on a finding that the funds in question were used to facilitate the commission of a crime. Instead, the jury verdicts determined that the forfeited funds were proceeds of Santacruz-Londono's drug and money laundering enterprise and were thereby forfeitable under 21 U.S.C. 881(a)(6). See Pet. App. 16b-18b; *id.* at 15a-16a.

Nothing in *Austin* suggests that the proceeds of illegal activity—as opposed to instrumentalities that facili-

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support the claimants' business activities; and that there was not enough cash in their accounts to pay their alleged business expenses. Gov't C.A. Br. 27-28. In addition, unusually large sums of money were transferred to the claimants after the arrests of the Santacruz-Londono associates in Luxembourg. *Id.* at 28.

tate such activity—could ever be "excessive" for Eighth Amendment purposes. To the contrary, the Court in *Austin* noted that "the forfeiture of contraband itself may be characterized as remedial"—and therefore outside the ambit of the Eighth Amendment—but that the same reasoning is not necessarily applicable to property that is merely an "instrument[]" of the drug trade. 113 S. Ct. at 2811. We are aware of no authority suggesting that the government must in some circumstances permit a criminal to retain—or to transfer to another party—the proceeds of a crime, because requiring the criminal to give up the proceeds would be excessive in relation to the severity of the crime. Accordingly, petitioners have failed to state an Eighth Amendment claim.[11]

6. Petitioners Organizacion JD Ltda., et al., argue (93-1020 Pet. 29-33) that the court of appeals erred in upholding the IRS levy against funds that were not found to be traceable to drug trafficking or money laundering.

Petitioners argue that because the district court already had entered a final judgment authorizing the return of their claimed funds to them, the court was without authority to amend that judgment and honor what they assert is a defective IRS levy.[12] Contrary to petitioners' argument, the district court was required to honor the IRS levy without inquiring into its validity or

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[11] Petitioners also claim that it violated their due process rights to forfeit the funds because they were innocent owners. They presented the innocent owner claim to the jury at trial and, with one exception, the jury rejected it.

[12] The IRS levy in fact was served on the clerk of the district court one week prior to the district court's entry of judgment. See Pet. App. 97b. After the district court issued its judgment, the government moved to amend the judgment to honor the levy. Instead of amending the judgment, the district court simply authorized the clerk to comply with the levy. *Id.* at 97b-98b.

competing claims to the funds levied upon. *United States* v. *National Bank of Commerce*, 472 U.S. 713, 721 (1985); *United States* v. *Badger*, 930 F.2d 754, 756 (9th Cir. 1991). As the court of appeals recognized, if petitioners want to contest the ownership of the funds levied upon, they must bring a wrongful levy action under 26 U.S.C. 7426. *United States* v. *Badger*, 930 F.2d at 757. Petitioners have in fact already filed such an action. See 93-1020 Pet. 31 n.13. Their wrongful levy claim accordingly should be adjudicated as provided by statute in the wrongful levy action, not in the context of this forfeiture case.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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